undisputed evidence shows that there was no knowledge of or consent to the variations by Ling.

While consent to variations may be inferred, we do not think consent can be inferred because of the conduct of Ling when that conduct is merely 'being abroad or busy with his own business'. Kidurong is in law a separate entity to its directors. Ling was not the managing director. He played no part whatsoever in negotiating any of the variations. He had no knowledge at the time of the variations. He was not consulted by Ting on such variations. He gave no authority whatsoever, express or implied, to anyone to consent to any variation. Ting himself confirmed this when he stated (see Part B, p 234):

> I agreed to the amendments. I did not consult anyone as the other parties were overseas and could not be easily reached. I was also the joint managing director of the first defendant.

As managing director, Ting could bind Kidurong but he could not bind a co-director on personal guarantees given to Madam Lim and the shareholders of Chen. Ting would require authority to bind Ling on any variation prejudicial to Ling. But Ling had given no authority express or implied to Ting or anyone else. The fact that Ling was abroad or busy at the time of the variations cannot amount to implied consent to the variations.

In our judgment, if the learned judge has not been led to compare the size of the whole project with the variations he would possibly have come to a different conclusion. The guarantors only guaranteed the due performance of a part of the whole project involving houses to be transferred to the respondents. We agree with the learned judge that the variations were material but we differ with him on the consequence of the variations. We consider that the effect of the variations were such as to discharge the third appellant Ling from his obligations in respect of the Taman Fairway and the Taman Hilltop guarantees. In our judgment, the third appellant succeeds on this ground also.

Accordingly, we allow the appeal of the third appellant with costs to be taxed both here and the court below. His deposits are to be refunded to him. As regards the first and second appellants, we dismiss their appeal with costs to be taxed both here and the court below. Deposit to respondents to account of taxed costs.

Order accordingly.

Solicitors: *Szetu & Co; Shelley Yap Leong Tseu Chong Chia & Co; Yong & Wong.*

Reported by *Prof Ahmad Ibrahim*

Re KO (an infant)

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 31-304-88
EDGAR JOSEPH JR J
3 JANUARY 1990

Family Law — Custody — Parents separated —Application by mother for custody of child — Welfare of infant to be paramount consideration — Customs of parties — Reports of welfare officers — Interview with child — Civil Law Act 1956, s 27 — Guardianship of Infants Act 1961, s 11 — Law Reform (Marriage and Divorce) Act 1976, s 88(3)

Evidence — Expert evidence — Judicial notice — Custom — Evidence Act 1950, ss 48 & 56

In this case, the parties, husband and wife, were married in 1976 and had a child from the marriage. The husband was a director of various family companies in Penang while the wife was a senior executive in a company in Kuala Lumpur. As a result of their careers, they had to live separately, the husband with the child in Penang and the wife in Kuala Lumpur. There were exchange visits on alternate weekends. The relations between the parties deteriorated and eventually the wife applied for the custody of the child. At the hearing, the learned judge, in addition to hearing the parties and their witnesses, had the benefit of reports from two welfare officers and expert opinion on Chinese custom and he also interviewed the child.

Held, granting custody to the mother:

(1) In considering the question of custody of the child, the welfare of the child should be the paramount consideration.

(2) Bearing in mind all the factors in the case and the submissions of counsel, the court concluded that custody, care and control of the child ought to be awarded to the wife, subject to reasonable access, including staying access to the husband, substantially during the holidays.

Cases referred to

1 *Koh Teng Lam* v *Elsie Koh Chen Chee & Anor* [1976] 1 MLJ 103 (folld)
2 *Mahabir Prasad* v *Mahabir Prasad* [1982] 1 MLJ 189 (refd)
3 *J* v *C* [1970] AC 668 (folld)
4 *Re K (Minors)* [1977] Fam 179 (refd)
5 *S(BD)* v *S(DJ)* [1977] Fam 109 (refd)
6 *Re McGrath* [1893] 1 Ch 143 (folld)
7 *Re Balasingam & Paravathy (Infants)* [1970] 2 MLJ 74 (folld)
8 *Dorothy Yee Yeng Nam* v *Lee Fah Kooi* [1956] MLJ 257 (folld)
9 *Re Satpal Singh (An Infant)* [1958] MLJ 283 (folld)
10 *G* v *G* (1982) 12 Fam Law 184 (folld)
11 *Elder* v *Elder* (1986) 16 Fam Law 190 (refd)
12 *H* v *H* [1974] 1 All ER 1145 (refd)
13 *Re Thain* [1926] Ch 676 (refd)
14 *Re W (A Minor)* (1982) The Times 27 (refd)
15 *J* v *J* (1978) 9 Fam Law 91 (refd)
16 *Clark* v *Clark* (1970) 114 SJ 318 (refd)
17 *Re T (A Minor)* [1980] 1 FLR 59 (refd)
18 *Re F (An Infant)* [1969] 2 All ER 766 (refd)

Legislation referred to

Civil Law Act 1956 s 27
Evidence Act 1950 ss 48, 56

Guardianship of Infants Act 1961 s 11
Law Reform (Marriage and Divorce) Act 1976 s 88(3)

Kan Weng Hin for the plaintiff.
K Balasundaram for the defendant.

Edgar Joseph Jr J: Broadly stated, the question central to this application is whether custody, care and control of the child, a boy, aged seven years and three months, should be given to the plaintiff or to the defendant.

It would be more convenient to refer to the plaintiff and the defendant hereinafter as the wife and the husband respectively.

The history of the matter which calls for the consideration of the court may be stated briefly. The husband and the wife, now aged 36 years and 34 years respectively, had known each other since about 1972, and had in fact studied and graduated from the same university in Manitoba, Canada, sometime in 1976, her education having been financed by his father, a prominent businessman in Penang. In May 1976, the husband and the wife returned to Malaysia and about two years later they were married at the Registry of Marriages, Ipoh, followed by a church service celebrating the marriage, a Chinese tea ceremony at the homes of the parents of both parties and a marriage reception hosted by the parents of the husband. The wife was then an air stewardess attached to MAS but six months later she resigned this post and joined Hong Leong Finance in Georgetown, Penang, as a marketing officer. The husband was then employed as an executive at the United Asian Bank, Penang, but in July 1979 he resigned that post and was appointed to the board of directors of various family companies, the most important, being apparently, Kim Sdn Bhd.

Soon after the marriage the couple resided at 22-C Cantonment Road, Penang, the residence of the husband's parents, but only as a temporary measure, while the matrimonial home — No 3 Jalan Meranti, Tanjung Bungah, Penang — was being renovated. In October 1979, they did in fact move into the matrimonial home. The wife proved to be a very dedicated officer, and by May 1981, she was promoted to branch manager of Hong Leong Finance, Penang.

On 19 August 1982, their son and only child was born. In the meanwhile, the wife continued her progress at work and, in April 1984, she was promoted to chief manager, Hong Leong Finance, northern region. In January 1987, she was offered the post of general manager of Hong Leong Leasing, Kuala Lumpur. If she accepted the offer, this would have necessitated her being based in Kuala Lumpur and therefore entailed disruption of family life. A crisis point had been reached as the wife wished to take up the offer in view of the prospects it offered while the husband opposed it strongly. The wife consulted a psychiatrist, Dr Tan Chee Kuan of Lam Wah Ee Hospital, Georgetown, who advised the husband to allow her to take up duties in Kuala Lumpur. Reluctantly, the husband agreed. To reduce the effects of disruption of family life occasioned by the transfer, the couple then arranged for exchange visits during alternate weekends in Penang and Kuala Lumpur; that is to say, the child, accompanied by the husband, would come down to Kuala Lumpur during one weekend while the wife would go up to Penang during the next.

In February 1987 — one month prior to actually taking up duties in Kuala Lumpur — the husband accompanied the wife to Kuala Lumpur to help her find accommodation there. On 1 March 1987, she took up duties in Kuala Lumpur.

The exchange visits as aforesaid commenced in March 1987 and continued for some six months but, even before that, in May 1987, the couple had ceased having marital relations. Indeed, by September 1987, the husband had raised and discussed the subject of divorce with the wife and, as from then, he stopped accompanying the child on visits to Kuala Lumpur. However, the exchange visits continued even up to the present time, with the qualification that after September 1987, the child was accompanied not by the husband but by a servant, on visits to Kuala Lumpur.

In February 1988, the husband consulted his solicitors and in the next month so did the wife. There then followed an exchange of acrimonious correspondence between the solicitors, copies of which appear in the agreed bundle of correspondence which need not detain us.

On 1 April 1988, at the matrimonial home in Penang, the wife encountered difficulties gaining access to the child. She alleged that the husband was being deliberately obstructive whilst he denied the charge, explaining that all he wanted was an assurance from her that the child would be brought back by a specified date. I do not propose to go into the rights or wrongs of this incident. Suffice it to say that the sequel of this incident was the institution of the present proceedings by the wife less than two weeks later.

The case for the wife has been argued on the premise that the husband is not a fit and proper person to have custody or care of the child as he is director of not less than ten corporations and has an active club life which leaves him minimal time for the care and upbringing of the child. The wife alleges that she has had matrimonial differences with the husband right from the start because of his childish ways and the continuous interference of his mother in their married life. More particularly, she alleges that the matrimonial differences arose primarily because of his unreasonable behaviour towards her, that is to say, his resentment over her rapid rise in her career.

On the other hand, the husband alleges that it was because the wife was always more interested in her career than her family life that the marriage deteriorated. He adds that he has never resented her career advancement but had always been concerned that she had been allowing her career to take precedence over family life. More particularly, it was submitted for him that the fact that the wife was prepared, over his vehement objections, to take up duties in Kuala Lumpur as general manager of Hong Leong Leasing, and so leaving the child behind in Penang to be looked after by a maid, afforded ample proof of the priority she had given to her career over her family. Again, it was said that even while she was in Penang, the wife's career was very demanding for she would leave the home at about 9 am, seldom returning before 7pm, and frequently going out later in the evening to entertain clients, with the result that she had very little time for the child.

I must also mention that both parties referred to certain specific incidents with a view to establishing marital misconduct. Presumably, this was relied upon to reveal a character which unfits the spouse concerned to have care and custody of the child. On behalf of the wife, it was suggested in cross-examination of the husband, that he had committed adultery with a lady friend with whom he has admittedly formed an attachment. To support this charge, certain events were referred to as affording opportunity for adultery. However, I am completely convinced, having regard to all the evidence, that the charge was groundless as there was no evidence either of opportunity or disposition to commit adultery. As Choor Singh J put it in *Koh Teng Lam* v *Elsie Koh Chen Chee & Anor*[1] at p 114:

> To use the words of Edmund Davies LJ in *Bastable* v *Bastable* [1968] 3 All ER 701, the fact that the respondent and the co-respondent were found together in a locked classroom is solid ground for profound suspicion; but suspicion of adultery, of course, is not enough, still less is mere opportunity to commit it. It must be proved.

For the same reason, the charge against the wife (which was based on even more slender evidence) was never made out. Indeed, the charge against her should never have been made.

Similarly, it was alleged by the husband that the wife had wrongfully removed from the safe in the matrimonial home and also from the safe deposit box in the Hongkong Bank, Georgetown, certain heirlooms of his family. The wife denied this, explaining that all she removed were certain personal items like her diploma and birth certificate. The evidence as regards these incidents amounts to an oath against an oath and I do not consider that the allegation has been made out. Again it was said that the wife had wrongfully withdrawn two sums of money from fixed deposit accounts in a Canadian bank standing to the credit of the husband and wife in their joint names. The wife admitted this but claimed that she was entitled to do so as it was an 'and/or account' and that she had used the money to furnish her apartment in Kuala Lumpur. I regret, I am unable without any contemporary documentary evidence, to assess the rights or wrongs of these transactions.

I must now confront the question of critical substance which arises for decision upon this application which I have referred to in the opening paragraph of this judgment. In my approach to this application, I have kept in the forefront of my mind, the crucial words of s 11 of the Guardianship of Infants Act 1961:

> The Court shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

Although the equivalent provision in the English statute, being s 1 of the Guardianship of Minors Act 1971, states, 'the court shall regard the welfare of the minor as the first and paramount consideration', it is clear that the difference in wording is without distinction, and English authorities, explaining their effect, have been consistently relied upon by our courts. (See, for example, the Federal Court decision in *Mahabir Prasad* v *Mahabir Prasad*[2] at p 193 per Raja Azlan Shah CJ (as he then was).)

Accordingly, I have derived much assistance from the following passage in the judgment of Lord MacDermott in the House of Lords in *J* v *C*,[3] explaining the words of the English provision aforesaid at p 710:

> It seems to me that they must mean more than the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think that they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices, and other circumstances are taken into account and weighed, the course to be followed is that which is most in the interest of the child's welfare as that term has now to be understood. That is the first consideration because it is of the first importance and the paramount consideration because it rules on or determines the course to be followed.

I note that in *Re K (Minors)*,[4] Stamp LJ advised at p 183 that the above passage 'should be in the mind of every judge who tries an infant case' and, in *S (BD)* v *S (DJ)*,[5] Sir John Pennycuick said at p 119, 'it cannot be repeated too often'. Indeed, it was cited with approval by the court in *Prasad*'s case.[2]

The principle that the welfare of the child is the paramount consideration was further emphasized in both *Re K*[4] and *S (BD)*.[5] In *Re K*,[4] the Court of Appeal held that the welfare of the child was a consideration that took precedence over the claims of the unimpeachable parent and the justice of the case as between the parents. In *S (BD)* v *S (DJ)*,[5] the trial judge was, on appeal, held to have misdirected himself when he said:

> ... that consideration (the children's welfare) is paramount, but not the only consideration in deciding matters of custody.

> I have regard especially to the welfare of the children, but I am also bound or entitled to have regard to the views of the unimpeachable parent, and I am bound to have some regard to the essential justice of the case.

It was held by the court that the judge should have asked himself the question, what was in the best interests of the children, and not, does the actual justice of the case require that care and control should be given to one parent rather than the other. The statute was perfectly clear that it was the children's interests which should predominate.

The question, what is meant by the expression 'welfare of the child' is answered for me by Lindley LJ in the oft-quoted case of *Re McGrath*,[6] at p 148, thus:

> But the welfare of the child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.

In *Re Balasingam & Paravathy (Infants)*,[7] it was held, per Raja Azlan Shah J (as he then was), that English law was applicable to cases regarding the custody and control of infants but regard had to be had to the religions and customs of the parties. This proposition has a statutory basis, for which see s 27 of the Civil Law Act 1956. In this context, the cases of *Dorothy Yee Yeng Nam* v *Lee Fah Kooi*[8] and *Re Satpal Singh (An Infant)*[9] also merit reading. In the first of these cases, Thomson J (as he then was) said, at p 263, that:

> ... the courts in effect have given judicial recognition to certain customs prevalent or thought to be prevalent amongst persons of Chinese race, irrespective of their domicile or religion. They have thus set up what might be called a sort of common law as affecting persons of Chinese race.

In the second of these cases, Buttrose J cautioned that:

> ... the court in exercising its discretion under the Guardianship of Infants Ordinance (Cap 16) ... should bear in mind the customs of the parties but should not consider itself bound by them as then it would not be exercising the discretion entrusted to it by the Ordinance.

It is with the above principles in mind that I turn to consider the particular circumstances of this case. In my opinion, both the parties must take the blame for the breakdown of this marriage though I would allocate the greater blame to the wife. It is difficult to resist the conclusion that it was her somewhat selfish decision to take up duties in Kuala Lumpur to further her ambitions which was the proximate and effective cause of the breakup of the marriage, a prospect she must have or ought to have foreseen. No doubt this conduct must have conduced to the husband acquiring and developing an interest in his lady friend. The effect of this on the child, which must have been equally foreseeable, did nothing to deter her in pursuing those ambitions. As for the husband, his recreational activities, did nothing to help the marriage either. But, to be fair to him, he did endeavour to be supportive of his wife in her career both when she was in Penang and, for a while, even later, when she moved to Kuala Lumpur. For example, he helped her find an apartment in Kuala Lumpur and, in July 1987, he signed an agreement jointly with the wife to purchase the Desa Damansara apartment. His subsequent visits to Kuala Lumpur when he accompanied the child there during the exchange visits in the early months of the wife's stay there, was further proof of this.

Incidentally, I do not accept the wife's evidence that when she decided to take up duties in Kuala Lumpur, the marriage was at an end. The evidence of the conduct of the parties then and shortly thereafter does not support this conclusion. However, I accept that by then the couple were experiencing unhappy differences.

Having said that, the question arises whether the conduct of the wife has been such that it should ipso facto disqualify her from having custody and control of the child. For many years the view held was that in children's cases a mother who had committed adultery should he deprived of the care and control of her children. But, attitudes have undergone drastic change. So, for example, *Re K (Minors)*,[4] concerned a boy aged five and a girl aged two. The father was an Anglican clergyman and the mother was a teacher of religion. The mother formed an adulterous association with a member of the church youth group. The parties separated. Upon wardship proceedings being instituted in court, the mother was granted care and control of the children as being 'the natural guardian, protector and comforter of very young children, and in particular of a very young girl'. The father was granted reasonable access. On appeal, the father argued that very considerable harm would be done to the children if they were brough up in a home where the mother and another man were living together in blatant defiance of church doctrine and all that the father believed in, and where those persons showed no repentance. It was held, dismissing the appeal, that this did not justify care and control being given to the father, because even if the father succeeded, access including staying access, would be given to the mother and the children would eventually learn of the relationship. The mother suceeded because the court was not prepared to take away a little girl of two from 'a really good mother' and nobody had suggested that the two children should be separated. I cite this case not because it bears any resemblance to the circumstances of the present case; indeed, they are poles apart but as an illustration of the extent to which the courts will sometimes go to hold that misconduct on the part of a mother, by itself, may not disquality her from having care and control of her children.

Accordingly, I would hold that in the present case, although the conduct of the wife in pursuing her career to the detriment of the marriage and therefore of the child's

interest, was reprehensible, it was not by itself sufficient to disqualify her from having custody, care and control of the child.

That however does not conclude the matter for I must go on to consider the rest of the circumstances as well in order to decide the issue which arises upon this application. It was argued by Mr Balasundaram, with his customary persuasiveness, that the wife's motives in bringing these proceedings were anything but altruistic. In support, he drew attention to what he considered were manifestly excessive financial claims she was making as appears from her solicitors' letters, some of which were somewhat intemperately worded. He also drew attention to the unexplained delay, of a little more than one year, in instituting these proceedings.

It is well known that in contested matrimonial proceedings, including proceedings for custody, the parties are often caught up in a whirlpool of emotions from which there is no apparent escape. Given such considerations, it is not at all surprising that claims and allegations may be overstated. I am not therefore prepared to accept that in bringing the present proceedings the wife was actuated by greed. As for the delay, this must be viewed against the background of the circumstances which surrounded the wife's departure for Kuala Lumpur, with the husband's concurrence, although reluctantly given, and the subsequent exchange visits, the trip by the husband, the wife and the child to Hong Kong on holiday as late as August 1987. The fact was that during the early part of her stay in Kuala Lumpur, the wife would stay in the matrimonial home during the exchange visits to Penang including the Chinese New Year of 1988 although she could very well have stayed at her parents' home. I see nothing improbable in the suggestion that this behaviour on her part indicated that she was hoping for a reconciliation and this might have explained the delay in the institution of proceedings. In any event, I do not consider the delay so serious as to cast doubts as to her bona fides in litigating the matter of custody.

More importantly, it was argued by Mr Balasundaram that the husband has had the custody and control of the child ever since 1 March 1987, that the child is happy in his environment in Penang where his friends are and is progressing well at school, so that to award custody to the wife would probably cause serious harm to the child, thereby impairing his future happiness and sense of security.

As against these considerations is the undoubted fact that ever since the wife's departure for Kuala Lumpur she has been in regular touch with the child through the exchange visits and on the telephone. It is not disputed that the child relates well to both parents and their respective homes, a fact which is apparent from the two welfare reports. Moreover, no medical evidence was adduced to show that the child would suffer any adverse effects to his mental or physical health or any distress in the event of his being removed from the care of the husband to that of the wife.

But, Mr Balasundaram drew my attention to the fact that the child, whilst in Penang, has been and continues to be looked after by his paternal grandmother who, although elderly, is in good health and that this arrangement has worked very well as the two are devoted to each other. On the other hand, he pointed out that should there be a change of care, his maternal grandaunt, an elderly spinster presently in Penang, would have to come down to Kuala Lumpur to help the wife to look after the child and there was no assurance that such an arrangement would endure sufficiently.

But there was also the evidence of the child's maternal grandmother who professed much love for him and spent much time with him. She said that she would be prepared to help the wife look after the boy in Kuala Lumpur if necessary. Furthermore, my attention was drawn by Mr Kan, counsel for the wife, to the fact that in view of the senior position she held in Hong Leong Leasing, she was in a position to set her own working schedule and was not obliged to entertain clients after office hours.

I am aware of the very special relationship between a grandparent and a grandchild. It is a biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and grandchildren. The tensions and conflicts which commonly mar relations between parents and children are often absent between those very same parents and their grandchildren. On the other hand, grandparents are apt to molly-coddle their grandchildren.

I might add that at the conclusion of the hearing and with the consent of counsel on both sides, I had interviewed the child in chambers, with the assistance of Mr Lim, the senior court interpreter, since I considered that the child's own views would be relevant to his welfare, because, for example, he may not settle well in an environment which he dislikes. But, I reminded myself that how influential an infant's wishes are will clearly depend upon the extent to which they coincide with his best interests in the opinion of the court. In *G* v *G*,[10] Dunn LJ said that it was extremely dangerous to place decisive weight upon the wishes of children at the age of twelve who were extremely suggestible and reluctant to upset their parents and are very protective towards them.

As a result of my interview, I found that the child had expressed an equal liking to be with both his parents.

There was no question of his disliking either the environment in Penang or that in Kuala Lumpur. He was obviously a healthy and happy child who was being well cared for. Counsel were informed of the result of my interview and offered the opportunity of making further submissions but understandably declined to do so.

I might add, as a matter of general interest, that where a judge interviews a child privately he may obtain additional information which is not available to the parties and which cannot be the subject of cross-examination. What the child says is not evidence in the strict sense and if the judge relies on it he can be seen as not being fair to the parties. (See *Elder* v *Elder*.[11]) The child should not be offered confidentiality because this would preclude the parties from considering the case fully. (See *H* v *H*.[12]) If the judge obtains additional information as a result of the intervew, he cannot rely on this without disclosing it and allowing the parties to make submissions. The child is spared the ordeal of the witness box but it is most exceptional for children to be called as witnesses in custody cases. Accordingly, the information obtained in this way may be of little value to the decision-making process.

Whilst on this topic of the effect on a child of a change of care, I should perhaps refer, for the sake of completeness, to the well known passage in the judgment of Eve J when speaking with reference to a girl of nearly seven who had been brought up by an aunt and uncle since birth in *Re Thain*,[13] which reads at p 684:

> It is said that the little girl will be greatly distressed and upset at the parting from Mr and Mrs Jones. I can quite understand it may be so, but, at her tender age, one knows from experience how mercifully transient are the effects of parting and other sorrows, and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days and kind friends, and I cannot attach much weight to this aspect of the case.

In the circumstances, I do not consider it right or proper to speculate that the child would suffer adverse effects in the event of a change of care. But, the real point of this application seems to be, whether the child should be deprived of the love, care and devotion of his natural mother, considering his tender age.

I have already observed that the child is now seven years and three months of age. So, the rebuttable presumption in law under s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 that it is for the good of a child below the age of seven years to be with his mother cannot possibly apply. There is no equivalent provision in United Kingdom legislation. Nevertheless, there are two cases decided there which I should like to cite.

In *Re K (Minors)*,[4] Sir John Pennycuick said that a mother, 'not as a matter of law but in the ordinary course of nature is the right person to have charge of young children'.

In *Re W (A Minor)*,[14] the Court of Appeal considered whether children of a tender age were best brought up by their natural mother. Cumming-Bruce LJ said that the view of the courts was to the following effect:

> (i) The individual circumstances of every case varied so much that any generalization had to be qualified in the light of the sensitive grasp of the realities of all the relationships between the child and all the grown-ups concerned.
>
> (ii) The capacity of the grown-ups who were put forward as claimants for care and control was of immense importance, including the capacity of forming an affectionate and loving relationship with the child concerned.
>
> (iii) If all such factors were nicely balanced, then probably it was right that a child of tender years should be brought up by the child's natural mother.
>
> (iv) When as a result of the separation of the parents, the mother had been cut off for a significant period from the continuous care of the child and the father and/or another woman had stepped into the breach, so that for months or years the child had been learning to base its security on the father and/or the other woman it became in each case a very delicate weighing exercise to decide whether it was right in the interests of the child to take the risk of uprooting the child in order that the child should be brought up by the natural mother.
>
> It did not help much to try to express the view in the form of the equation that the child was to be with its mother, other things being equal, unless there was strong reason for saying that its best interests would be away from her. Instead of saying unless there was strong reason, it was safer to say, unless there was some reason. The appreciation of the relevant factors varied so immensely that any attempt to formulate the view of the courts was unlikely to be helpful.

There are two further matters I would like to refer to, namely, the two reports by the two welfare officers of the Social Welfare Department of Penang and Kuala Lumpur dated 3 April 1989 and 12 October 1988, respectively, and the affidavit (encl 19) affirmed to on 1 July 1988 by Tan Sri Lee Siow Mong, an expert on Chinese Family Law, and filed on behalf of the husband.

I shall take firstly the welfare reports, copies of which were provided to counsel. The welfare officer of Penang, Che Nirmala Devi, has, in recommending that the child stays with the husband and during the holidays with the wife, made two observations, namely, that the husband and the paternal grandparents devote full care and love to the child and that he has a very close relationship with the husband. She has given substantial particulars to support these observations.

The welfare officer of Kuala Lumpur, Che Mumtaz Begum Mohd Sultan, does not in her report expressly recommend that care of the child be given to the wife, but there is an implication to that effect. She has made a number of observations and also given her assessment; for example, and here I would for convenience quote her:

> From the aspect of personality, Mdm Amy is a woman who is active, efficient and very successful in her career. Neverthe-

less, she has a kind attitude and like any other woman, is good at housekeeping. Apart from playing squash and swimming during her free time, she also likes to do housework, cooking and decorating. She has friends whose children always visited her and played with her son when the child came to Kuala Lumpur. As a result of the conversation with Mdm Amy, it was discovered that she has a close relationship with the child. She also showed photographs of the child with other members of the family and what is most special was the photographs of her son's birthday celebration which was held at the poolside of her house. As a mother, Mdm Amy wants to be given a chance to take care of the child because he is her only child. She has at the moment no plans for getting married. She wants to give full attention to her son and to bring him up properly. In view of her stable economic condition, Mdm Amy is actually capable of taking care of the child.

The environment of her house is also suitable and safe as there is a security guard. The atmosphere surrounding the house is also suitable for the upbringing of the child.

Mdm Amy has divulged her feelings and prays that she as a mother be given a chance to raise the child. As an open-minded person, she has no objections if the father of the child be given access to the child from time to time.

Both officers have reported very favourably about the home conditions and the financial position of the parties and I am satisfied that this is amply justified by the evidence. I would add, however, that compared to the wife, the husband is obviously in a better financial position to provide for the material well-being of the child.

I must now touch on the status of welfare reports in cases where there is a contested issue regarding custody. The function of the welfare officer in making their reports is to act in an independent capacity and in that way to help the court. They will have to investigate the child's position thoroughly and report objectively. The court will expect a comprehensive picture of the matter at issue. Some of the more obvious points on which welfare officers would be expected to investigate and make their asssessment would be:

(1) the proposed arrangements for the care of the child;
(2) the relationship between the child and the proposed caretaker or competing caretakers;
(3) the wishes and feelings of the child;
(4) the respective merits of the parents;
(5) whether access to a particular person is desirable, and if so, the amount of access.

In *Re W (A Minor)*,[14] the court drew attention to the need for welfare officers charged with the responsibility of preparing a report to assist the judge in a custody case, to seek to discharge the responsibility even outside normal working time. It was of the utmost importance that the welfare officer found a way of getting to know the child in both homes, when the child was living in one home and going to the other home on access visits.

I note that in the present case, neither welfare officer has done this, so to that extent their reports are open to serious criticism. Accordingly, after having reserved judgment, but before delivering the same, I had invited the attention of counsel on both sides to this omission and asked them if they wished to have the omission repaired. But, neither wished to do so.

I also note since reserving judgment, that there is a practice note in the UK (see (1973) 117 SJ 88) that it is undesirable for there to be two welfare reports from different welfare officers and wherever possible there should be one report made by one officer recording his own observations. In the present case, resort to two officers was perhaps had on grounds of convenience because while the child was living in the home in Penang he was going to the other home in Kuala Lumpur on access visits.

I need hardly say that a recommendation made by the welfare officer need not be followed by the court. See for example, the case of *J v J*.[15] In that case, in upholding the judge in the court below, Ormrod LJ said:

> He (the judge) was differing from the view of the welfare officer, but one of the handicaps from which welfare officers suffered was that they did not have the benefits of hearing people under cross-examination. They had many other advantages over judges but that was one of their disadvantages so far as judges were concerned.

However, if the court differs from the officer's view, it is essential that it should explain why it does so. (See *Clark v Clark*[16] and *Re T (A Minor)*.[17]) In *Re T (A Minor)*,[17] the court said that a judge should carefully spell out his reasons for departing from the plain recommendation of a welfare officer.

I shall take next to the affidavit of Tan Sri Lee Siow Mong who had since died though he was still alive at the commencement of these proceedings when Mr Marbeck, who was then counsel for the wife, raised an objection as to its admissibility on the ground that the contents thereof on custom were based upon hearsay. It was also objected to on the ground that the parties had contracted a marriage registered under the Civil Marriages Act 1952.

In an oral ruling, I overruled the objection and ordered that the affidavit could be read in court provided that the deponent attended for cross-examination. In the event, he did not attend for cross-examination.

In my view, the objection taken by counsel for the wife was without substance as the opinion expressed by Tan Sri Lee was as to Chinese custom, a field in which he was undoubtedly competent, and such facts as he relied upon were common ground. (See s 48 Evidence Act 1950.) Nevertheless, to be fair to the wife, I had ruled that the affidavit could be read as evidence provided that Tan Sri Lee attended for purposes of cross-examination. In the event, he did not attend for cross-examination. I am now told by Mr Balasundaram that he had died on 31 August 1989, and that no reliance was being placed on the affidavit.

Nevertheless, I consider that I can take judicial notice of the customs to which Tan Sri Lee had referred. (See *Dorothy Yee Yeng Nam*'s case,[8] per Thomas J.) And, by s 56 of the Evidence Act 1950, no fact of which the court will take judicial notice need be proved. Moreover, s 27 of the Civil Law Act 1956 obliges me in all cases relating to custody and control of infants to have regard to the religion and customs of the parties unless other provision is made by written law.

Tan Sri Lee had, in his affidavit, referred to Chinese custom and tradition in these terms:

(1) A Chinese family is a closely knit unit consisting of parents, children, grandchildren and so on. Only sons provide the link between the father and his ancestors. Daughters marry out when they reach adulthood and become members of the husbands' families, and the children are members of the husbands' families.

(2) Sons take on the surname of the father and continue with it through their sons to continue and perpetuate the family line and in all matters of succession and inheritance.

(3) The eldest son or only son of a family inherits the right as head of the family when the father dies in such matters as ancestral worship and management of family property. Therefore he is the most important in the family.

(4) The succession of a father by his son is so important that if a man has no son, he invariably adopts one from within the clan according to custom.

(5) Clan associations serve an important social and perhaps somewhat religious purpose. Apart from other activities, they worship distant ancestors from whom members of the clan have descended. Families worship immediate ancestors up to not more than five generations.

(6) Datuk Ong, being chairman of the Ong Kongsi and leader of many other Chinese organizations in Penang, must in my opinion be a person who holds dear Chinese customs and traditions. This opinion is reinforced by the fact that subsequent to the registry marriage in Ipoh he had the traditional tea ceremony in his house and also hosted a marriage reception. Tradition dies hard, so goes a saying.

(7) According to Chinese custom, a married woman when divorced or separated from the husband cannot take her children with her, unless the husband agrees. Sons especially must remain with the father to be brought up in the atmosphere of the family home to understand certain family customs and traditions, for they alone continue and perpetuate the family line. This is the custom and tradition observed by the Chinese from time immemorial.

I have already quoted the observation of Buttrose J in *Re Satpal Singh*'s case[9] that while the court should, in exercising its discretion under the Guardianship of Infants Ordinance 1961, bear in mind the customs of the parties, it should not consider itself bound by them. And so it will be in this case as the court arrives at its conclusion. It will not slavishly parrot Tan Sri Lee's opinion but will weigh the expert testimony and use it if and when appropriate to reach its decision.

This court has spent several days in the actual trial of the issues before it. The testimony and the tangible evidence have been carefully listened to, noted and reviewed. The credibility of the witnesses has been examined, tested and weighed. There can seldom, if ever, be a solution satisfactory to all in cases of this kind. Justice our desired objective, to the child and the mother, to the child and the father, cannot be obtained for both parents. The court will have to achieve justice for the child, whose welfare and best interest are its responsibility as parens patriae. This means that the court will have to seek a solution which will give paramount consideration to the welfare of the child, that is to say, his comfort and health on the one hand, and moral, intellectual and spiritual welfare on the other. (See *Re McGrath.*[6]) The court will also have to give proper regard to s 27 of the Civil Law Act 1956, the effect of which is that in considering the basic welfare of the child, the court must view his welfare through the eyes of a wise modern parent. The court must take into account all the particular circumstances relevant to the child. At the end of the day it has that single decision to make, namely, what is best for the welfare of the child?

Bearing in mind all the factors outlined in this judgment and not forgetting the submissions of counsel on both sides, I have, after anxious consideration, arrived at the inevitable conclusion that custody, care and control of the child ought to be awarded forthwith to the wife subject to reasonable access, including staying access, to the husband, substantially during the holidays. Like Megarry J in *Re F (An Infant)*[18] at p 770, I too, would say, that the wife's failings as a wife have not made her so bad a mother as to displace the greater need that young children have for the mother rather than the father and her ability to satisfy that need. Costs are to follow the event.

The ancillary question of maintenance for the child was adjourned to a date to be fixed by the senior assistant registrar to enable the parties to adduce evidence and to make such submissions as they may think fit.

Application allowed.

Solicitors: *CH Liew & Co; Balasundaram & Co.*

Reported by *Prof Ahmad Ibrahim*